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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte RICHARD J. MARTIN

Appeal 2008-3758
Application 10/669,862
Technology Center 3600

Decided:¹ March 16, 2009

Before LINDA E. HORNER, JOHN C. KERINS, and
MICHAEL W. O'NEILL, *Administrative Patent Judges*.

HORNER, *Administrative Patent Judge*

DECISION ON APPEAL

¹ The two month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

STATEMENT OF THE CASE

Richard J. Martin (Appellant) seeks our review under 35 U.S.C. § 134 of the Examiner's decision rejecting claims 8-27, which are all of the pending claims. We have jurisdiction under 35 U.S.C. § 6(b) (2002).

SUMMARY OF DECISION

We AFFIRM-IN-PART.

THE INVENTION

The Appellant's claimed invention is a method for tracking turbine components to determine the remaining life of the components. Spec. 1:5-6; Claims Appendix. Claim 8, reproduced below, is representative of the subject matter on appeal.

8. A method of tracking turbine components, comprising:

marking a plurality of turbine components with indicia applied to a surface of the components;

placing the marked turbine components in a plurality of turbines;

operating the turbines;

obtaining operation data from the turbines via at least one turbine control system;

uploading the operation data from the turbine control systems to a central processing station; and

using the uploaded data at the central

processing station to track desired aspects of the marked turbine components.

THE REJECTIONS

The Examiner relies upon the following as evidence of unpatentability:

Herron	US 6,343,251 B1	Jan. 29, 2002
Isobe	US 6,636,813 B1	Oct. 21, 2003
Henry	US 6,845,306 B2	Jan. 18, 2005

The Appellant seeks review of the following:

1. The Examiner's rejection of claims 8, 9, 12-18, and 20 under 35 U.S.C. § 103(a) as unpatentable over Herron and Henry; and
2. The Examiner's rejection of claims 10, 11, 19, and 21-27 under 35 U.S.C. § 103(a) as unpatentable over Herron, Henry, and Isobe.

ISSUES

The Examiner found that Herron discloses a method of tracking turbines by operating the turbines, obtaining operation data from the turbines, uploading this information to central processing station, and using the data to track aspects of the turbines. Ans. 6-7. The Examiner determined that Herron does not particularly disclose marking the turbine components. Ans. 7. The Examiner found that it is notoriously old to use markings such as serial numbers on the surfaces of parts, and further found that Herron teaches the use of turbine serial numbers to identify turbines being monitored. Ans. 7. The Examiner relied on Henry for its disclosure

of component trend monitoring of component parts of gas turbine engines using a serial number. Ans. 7-8. The Examiner concluded that it would have been obvious to one of ordinary skill in the art at the time the invention was made to have implemented the serial number based tracking of turbine components, as taught by Henry, within the context of the turbine operation monitoring and part-life consumption prediction method of Herron, for the purpose of tracking the operational history and predicting the useful life of individual turbine components, because such a combination is the application of a known technique of monitoring individual component parts by serial number to a known similar method for the predictable result of tracking the components and predicting or determining the part's life consumption within a turbine being monitored by the turbine monitoring system. Ans. 8-9. The Examiner further relied on Isobe to teach monitoring certain specific aspects of turbine components. Ans. 12-13.

The Appellant contends that the prior art does not disclose "marking a plurality of turbine components with indicia applied to a surface of the components," as recited in claim 8. App. Br. 7-9; Reply Br. 2. The Appellant further contends the Examiner erred in combining the teachings of Herron and Henry. App. Br. 5-6. The Appellant also contends that the Examiner failed to set forth in sufficient detail a prima facie case of obviousness of claims 10, 11, 19-21, and 27. App. Br. 11-13.

The issues presented by this appeal are:

Has the Appellant shown the Examiner erred in determining that it would have been obvious to mark a plurality of turbine components with

indicia applied to a surface of the components in view of the teachings of Herron and Henry?

Has the Appellant shown the Examiner erred in determining that one having ordinary skill in the art would have been led to modify the turbine monitoring method of Herron with the component tracking method of Henry in the manner claimed?

Has the Appellant shown the Examiner erred in failing to adequately set forth the basis for the rejection of obviousness of claims 10, 11, 19-21, and 27?

FINDINGS OF FACT

We find that the following enumerated findings are supported by at least a preponderance of the evidence. *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1427 (Fed. Cir. 1988) (explaining the general evidentiary standard for proceedings before the Office).

1. It is undisputed that neither Herron nor Henry explicitly discloses marking turbine components with indicia “applied to a surface of the components.” Ans. 7; App. Br. 9.
2. The Examiner’s rejection of claim 8 is based on the finding that “markings such as serial numbers are generally applied to the surface(s) of components in such a manner so as to be readable by a human looking at said surface.” Ans. 7.
3. The Appellant does not present an adequate challenge to the Examiner’s statement that it was, in fact, well known to mark an

item with a serial number on its surface, nor does Appellant adequately explain why the noticed fact is not considered to be common knowledge or well-known in the art. App. Br., *passim*; Reply Br., *passim*.

4. The Appellant's invention focuses on the concept of tracking component parts as opposed to tracking the turbine as a whole. Spec. 2, l. 23 – Spec. 3, l. 7 (describing drawbacks with methods that rely on a maintenance schedule for a turbine as a whole, including the problem with individual turbine components being used on more than one turbine, the problem when a component type is not identical with another similar component type, and the problem when some individual component types are repaired or replaced while other individual component types are not), and Spec. 3, ll. 12-17 (describing the Appellant's turbine component tracking system as “advantageously adapted to determine the remaining life of individual turbine components”).
5. The Examiner relied on Henry for the teaching that it was known to be desirable at the time of the invention to track turbine components to predict the useful life of individual components. Ans. 8-9 and 15-16. Henry discloses marking of component parts with indicia; however, Henry achieves this marking using a chip having the part's serial number stored therein, where the chip is embedded in the part. Henry, col. 2, ll. 42-52.

6. In a declaration submitted by the inventor, Mr. Martin attests that to modify Herron's system to track turbine components would require a person "to vastly change [Herron's] principle of operation (e.g. the controller 14, on-site monitor 16, remote database 18, among other features would have to be completely redesigned and overhauled to enable it to track individual components)." DECLARATION OF RICHARD MARTIN UNDER 37 C.F.R. § 1.131 ("Martin Decl."), para. 5.
7. Mr. Martin's declaration does not state that such a modification to Herron would have been beyond the skill of one having ordinary skill in the art. Martin Decl., *passim*.
8. Further, Mr. Martin's statement does not explain how the Examiner's proposed modification would change the principle of operation of Herron's system. Martin Decl., *passim*.
9. It appears that with the proposed modification, Herron's system would operate in the same manner, while enabling the system to track items at a finer level of detail (e.g., using serial numbers of individual parts in its database in place of serial numbers associated with individual turbines).
10. Isobe discloses calculating a total cost for repairing a damaged part to determine which operational schedule to adopt. Isobe, col. 12, ll. 25-32.
11. Isobe teaches an instance in which a part currently in use is determined to be damaged (i.e., cracked). Isobe, col. 9, ll. 55-56.

12. As such, Isobe identifies a turbine engine that may have a particular component need depending on the state of the damage, i.e., repair or replacement of the damaged part. See e.g. Isobe, col. 3, ll. 49-52 (discussing eventual repair or replacement of a damaged part) and Isobe, col. 5, ll. 52-57 (“At the client system 5b ... judgments concerning the evaluation of the remaining life of parts and their repairing or replacement are performed.”).
13. In order to replace a damaged part, a new, repaired, or refurbished part matching the part to be replaced would need to be identified.
14. The Examiner’s rejection of claim 21 is based on the teachings of Herron and Henry of using serial numbers to track turbines or turbine components in combination with the finding of fact, made by taking official notice, that “it is notoriously old and well known to make use of bar codes for the purpose of identifying and tracking items, thereby yielding the use of a known technique to yield a predictable result of identifying and distinguishing between similar types of components in the same manner that one would with the use of serial numbers as taught previously by Henry et al.”
Ans. 14.

PRINCIPLES OF LAW

The Board may affirm a rejection under 35 U.S.C. § 103 based on the Examiner’s official notice of facts, without citation of references, where Appellant was sufficiently put on notice of the basis of the rejection and did

not challenge the truth of the Examiner's assertion. *See In re Lundberg*, 244 F.2d 543, 551 (CCPA 1957) (examiner's statement accepted as true in light of appellant's failure to question its accuracy or to present contradicting evidence); *In re Fox*, 471 F.2d 1405, 1406-07 (CCPA 1973) (affirming rejection under 35 U.S.C. § 103 without citation of any prior art based on facts that were unchallenged by the appellant); *In re Boon*, 439 F.2d 724, 727 (CCPA 1971) (the appellants failed to rebut a finding of official notice when they offered only a bald challenge to the Examiner's findings without presenting the requisite information or argument that creates, on its face, a reasonable doubt regarding the validity of the Examiner's findings). To adequately traverse Official Notice, an appellant must specifically point out the supposed errors in the examiner's assertions, which includes stating why the noticed fact is not considered to be common knowledge or well-known in the art. *Compare In re Knapp-Monarch Co.*, 296 F.2d 230, 232 (CCPA 1961) (considering challenge to taking of judicial notice by Trademark Trial and Appeal Board), *see also* 37 C.F.R. § 1.111(b).

“Section 103 forbids issuance of a patent when ‘the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.’” *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, ___, 127 S. Ct. 1727, 1734 (2007). The question of obviousness is resolved on the basis of underlying factual determinations including (1) the scope and content of the prior art, (2) any differences between the claimed subject

matter and the prior art, (3) the level of skill in the art, and (4) where in evidence, so-called secondary considerations. *Graham v. John Deere Co.*, 383 U.S. 1, 17-18 (1966). *See also KSR*, 550 U.S. at ___, 127 S. Ct. at 1734 (“While the sequence of these questions might be reordered in any particular case, the [*Graham*] factors continue to define the inquiry that controls.”)

ANALYSIS

Rejection of claims 8, 9, 12-18, and 20 under 35 U.S.C. § 103(a) as unpatentable over Herron and Henry

The Appellant argues claims 8, 9, 12-18, and 20 as a group. App. Br. 10. As such, we select claim 8 as the representative claim, and claims 9, 12-18, and 20 stand or fall with claim 8. 37 C.F.R. § 41.37(c)(1)(vii) (2008).

It is undisputed that neither Herron nor Henry explicitly discloses marking turbine components with indicia “applied to a surface of the components” (Fact 1). The Examiner’s rejection is based on the finding that “markings such as serial numbers are generally applied to the surface(s) of components in such a manner so as to be readable by a human looking at said surface” (Fact 2).

The Appellant argues that the Examiner erred in relying on this finding in reaching the conclusion of obviousness because the Examiner failed to follow the procedure for taking official notice as set forth in MPEP § 2144.03. App. Br. 9. This section of the MPEP provides that “[o]fficial notice unsupported by documentary evidence should only be taken by the examiner where the facts asserted to be well-known, or to be common

knowledge in the art are capable of instant and unquestionable demonstration as being well-known.” The MPEP also provides that “[i]t is never appropriate to rely solely on ‘common knowledge’ in the art without evidentiary support in the record, as the principal evidence upon which a rejection was based.” MPEP § 2144.03(A) (citing *In re Zurko*, 258 F.3d 1379, 1385-86 (Fed. Cir. 2001) (“[The Board’s] expertise may provide sufficient support for conclusions [only] as to peripheral issues” and on “core issues,” the Board “cannot reach conclusions based on its own understanding or experience— or on its assessment of what would be basic knowledge or common sense”).

We understand *Zurko* to distinguish between peripheral issues, for which reliance on official notice is proper, and core issues, for which reliance on official notice is improper. The question presented here is whether the marking of component parts with indicia on their surface is a core or peripheral issue. Henry discloses marking of component parts with indicia; however, Henry achieves this marking using a chip having the part’s serial number stored therein, where the chip is embedded in the part (Fact 5). So, the Examiner did not rely solely on official notice to find that it is well known to mark a component part with indicia. The Examiner’s discussion of the Henry patent evidences that the Examiner relied on the teachings of Henry to establish this fact as well. The Examiner relied solely on official notice only for the finding that it was well known to put this marking of a serial number *on the surface* of the part to be marked. We find the issue of whether it is well known to mark the surface of an article with a serial

number to be a peripheral issue to the determination of patentability of claim 8. This conclusion is based on the fact that the Appellant is not claiming to be the first to think of marking an item with a serial number on the surface of the item to be marked. In particular, the Appellant does not present an adequate challenge to the Examiner's statement that it was, in fact, well known to mark an item with a serial number on its surface, nor does Appellant adequately explain why the noticed fact is not considered to be common knowledge or well-known in the art (Fact 3). In other words, the Appellant's invention is not premised on a patentable distinction between marking a part's surface versus embedding the marking within the part. Rather, the Appellant's invention focuses on the concept of tracking component parts as opposed to tracking the turbine as a whole (Fact 4).

MPEP § 2144.03(B) further states that when official notice is taken of a fact that is asserted to be "common knowledge", "[t]he examiner must provide specific factual findings predicated on sound technical and scientific reasoning to support his or her conclusion of common knowledge." MPEP § 2144.03(B) (citing *In re Soli*, 317 F.2d 941 (CCPA 1963) and *In re Chevenard*, 139 F.2d 711 (CCPA 1943)). An articulated finding is required so that the applicant is presented with a basis on which to traverse the rejection. In *In re Chevenard*, 139 F.2d at 713, the court accepted the examiner's finding that a brief heating at a higher temperature was the equivalent of a longer heating at a lower temperature where there was nothing in the record to indicate the contrary and where the applicant never demanded that the examiner produce evidence to support his statement. In

this case, as in *Chevenard*, the Examiner has made a specific factual finding that it was well known to mark serial numbers on the surface of items to be marked. This statement, alone, provided a sufficient basis for the Appellant to traverse the rejection. Notably, the Appellant chose not to challenge this finding with arguments that such a practice was not well known in the art (Fact 3). As such, in the absence of any evidence in the record to rebut this finding, we accept the Examiner's finding as admitted fact.

The Appellant further challenges the Examiner's conclusion of obviousness by arguing that Henry's chip, which is used to mark component parts of a turbine, could not be physically attached to the surface of Herron's components parts because the chips would incinerate from high heat conditions. App. Br. 6. The Appellant also supported this argument with a Declaration from the inventor. *See* Martin Decl., para. 7. Even if we adopt as fact that it would not have been possible to use Henry's chip on the surface of the components of Herron's turbine, this fact does not rebut the basis for the Examiner's rejection. The Examiner did not base the conclusion of obviousness on the bodily incorporation of Henry's chip in Herron's turbine and components thereof. Rather, the Examiner relied on Henry for the teaching that it was known to be desirable at the time of the invention to track turbine components to predict the useful life of individual components (Fact 5). "The test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference.... Rather, the test is what the combined teachings of those references would have suggested to those of ordinary skill in the art."

In re Keller, 642 F.2d 413, 425 (CCPA 1981). *See also In re Sneed*, 710 F.2d 1544, 1550 (Fed. Cir. 1983) (“[I]t is not necessary that the inventions of the references be physically combinable to render obvious the invention under review.”); and *In re Nievelt*, 482 F.2d 965, 968 (CCPA 1973) (“Combining the teachings of references does not involve an ability to combine their specific structures.”). Along these lines, the Supreme Court has noted that “if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill.” *KSR*, 550 U.S. at ___, 127 S.Ct. at 1740.

The Appellant further argues that because Herron pertains to maintenance schedules for turbines, not component parts, the Examiner’s proposed modification would require a person to “vastly change its principle of operation” to enable the system of Herron to track components. App. Br. 5. The Appellant also supported this argument with a Declaration from the inventor. *See* Martin Decl., para. 5. Mr. Martin attests that to modify Herron’s system to track turbine components would require a person “to vastly change [Herron’s] principle of operation (e.g. the controller 14, on-site monitor 16, remote database 18, among other features would have to be completely redesigned and overhauled to enable it to track individual components)” (Fact 6). What this statement tells us is only that a change to the system of Herron would be required to enable the system to track individual turbine components. Notably, Mr. Martin’s declaration does not

state that such a modification to Herron would have been beyond the skill of one having ordinary skill in the art (Fact 7). Further, Mr. Martin's statement does not explain how the Examiner's proposed modification would change the principle of operation of Herron's system (Fact 8). It appears that with the proposed modification, Herron's system would operate in the same manner, while enabling the system to track items at a finer level of detail (e.g., using serial numbers of individual parts in its database in place of serial numbers associated with individual turbines) (Fact 9). This modification would achieve a predictable result in view of the teaching in Henry to track component parts for exactly the same reason as the turbines are monitored in Herron.

While the Appellant states that dependent claims 9, 12-18, and 20 are patentable based on their dependency from independent claim 8 (App. Br. 10), the Appellant further argues, with respect to claim 20, that the Examiner fails to indicate where or how the prior art teaches or suggests the limitation that the markings are readable by a human looking at the surface of the component. App. Br. 12. The Examiner, however, as part of his taking of official notice, stated that "markings such as serial numbers are generally applied to the surface(s) of components in such a manner so as to be readable by a human looking at said surface." Ans. 7. For the same reasons provided *supra* in our analysis of claim 8, we take this fact as admitted because the Appellant has failed to seasonably challenge this finding.

Rejection of claims 10, 11, 19, and 21-27 under 35 U.S.C. § 103(a) as unpatentable over Herron, Henry, and Isobe

Claims 10, 11, and 19

The Appellant argues the Examiner erred in rejecting claims 10, 11, and 19 because the Examiner does not specifically point to where Isobe teaches each limitation of these claims. App. Br. 11-12.

Claim 10 recites the method of claim 8 wherein the marking identifies a material composition from which at least a portion of the turbine component was manufactured. Claim 11 recites the method of claim 8 wherein the marking identifies a manufacturing step from which at least a portion of the turbine component was manufactured. The Examiner cites to those portions of Isobe that disclose taking into account a thermal barrier coating to be used on a component to extend the useful life of the component. Ans. 13. The Examiner found that the subject matter of claims 10 and 11 includes “whether or not a thermal barrier coating is or has been applied (a material composition, in addition to that of the turbine blade itself), and the coating of the blade is also considered to be a manufacturing process step with the context of claim 11.” *Id.* While we agree that consideration of whether a thermal barrier coating has been applied to a part pertains to both a material composition and a manufacturing step, the Examiner has failed to explain how this disclosure in Isobe would have led one having ordinary skill in the art to include this information in the marking applied to the surface of the part, as required by claims 10 and 11. It is not necessarily the case that the serial number or other marking on the part

would include an indication of these claimed aspects of the part. As such, we cannot sustain the rejection of claims 10 and 11.

Claim 19 recites the method of claim 8, wherein the statistical analysis is performed on the operational data to help estimate the cost of a repair operation (claim 19). For this claim, the Examiner found that Isobe discloses consideration of the cost to repair or replace a damaged part of a gas turbine. Ans. 21, citing Isobe, col. 1, lines 40+. We further note that Isobe discloses calculating a total cost for repairing a damaged part to determine which operational schedule to adopt (Fact 10). As such, the Appellant has failed to persuade us of error in the rejection of claim 19.

Claim 21

Claim 21 recites the method of claim 8, wherein the turbine components are marked with a bar code.

The Appellant argues that the Examiner erred in rejecting claim 21 because the Examiner previously issued a restriction requirement in which he determined that marking with a bar code (species A) and marking with a serial number (species B) were patentably distinct species, so it is improper for the Examiner to now claim that the bar code species is obvious in view of Herron and Henry, which discloses the serial number species. App. Br. 12; Reply Br. 3-4. While the Appellant's argument, at first blush, seems logical, the argument is based on a misunderstanding as to the basis for the Examiner's rejection. The Examiner's rejection is not stating that it would have been obvious in view of the prior art disclosure of marking with serial numbers to use a bar code for marking. Rather, the Examiner's rejection is

based on the teachings of Herron and Henry of using serial numbers to track turbines or turbine components in combination with the finding of fact, made by taking official notice, that “it is notoriously old and well known to make use of bar codes for the purpose of identifying and tracking items, thereby yielding the use of a known technique to yield a predictable result of identifying and distinguishing between similar types of components in the same manner that one would with the use of serial numbers as taught previously by Henry et al.” (Fact 14). Thus, the Examiner did not conclude that it would have been obvious based on the disclosure of serial numbers alone to use bar codes. As such, the Examiner’s conclusion of obviousness of claim 21 is not contradictory to the determination that this species is patentably distinct from the use of serial numbers. The Appellant has not persuaded us that the Examiner erred in the rejection of claim 21.

Claims 22-26

Claims 22-26 depend from claim 8. The Appellant has not provided any further arguments for patentability of these claims. We understand this to mean that the Appellant is simply relying on the arguments presented for patentability of claim 8, and have no further rebuttal to the Examiner’s use of Isobe in combination with Herron and Henry in the rejection of claims 22-26. For the reasons provided *supra*, we are not persuaded of error in the rejection of claim 8. As such, we are likewise not persuaded of error in the rejection of claims 22-26.

Claim 27

Claim 27 recites the method of claim 8, wherein a new, repaired or refurbished turbine marked turbine component is coordinated or matched with turbine engines having a particular turbine component need. The Appellant argues only that “[t]he Examiner fails to indicate where or how the prior art teaches or suggests this limitation.” App. Br. 12-13. On the contrary, the Examiner found that Isobe teaches “tracking component information with respect to real component damage, design of the components, materials used, etc., for the evaluation of the remaining useful life of components.” Ans. 14 (citing Isobe, Abstract, Figs. 7, 16, 27C, and col. 6, ll. 1-35, col. 9, l. 55 – col. 10, l. 28, and col. 12, ll. 25-53). For example, Isobe teaches an instance in which a part currently in use is determined to be damaged (i.e., cracked) (Fact 11). As such, Isobe identifies a turbine engine that may have a particular component need depending on the state of the damage, i.e., repair or replacement of the damaged part (Fact 12). In order to replace a damaged part, a new, repaired, or refurbished part matching the part to be replaced would need to be identified (Fact 13). Thus, Isobe at least inherently discloses matching a new turbine component with a turbine engine having a particular turbine component need. As such, the Appellant has not persuaded us of error in the rejection of claim 27.

CONCLUSIONS

The Appellant has failed to show the Examiner erred in determining that it would have been obvious to mark a plurality of turbine components

with indicia applied to a surface of the components in view of the teachings of Herron and Henry.

The Appellant has also failed to show the Examiner erred in determining that one having ordinary skill in the art would have been led to modify the turbine monitoring method of Herron with the component tracking method of Henry in the manner claimed.

The Appellant has shown the Examiner erred in failing to adequately set forth the basis for the rejection of obviousness of claims 10 and 11, but has not shown the Examiner erred in rejecting claims 19-27 under 35 U.S.C. § 103(a).

DECISION

The decision of the Examiner to reject claims 8, 9, and 12-27 is affirmed, and the decision of the Examiner to reject claims 10 and 11 is reversed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2007).

AFFIRMED-IN-PART

Appeal 2008-3758
Application 10/669,862

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